



NATIONAL DISABLED STUDENTS UNION

The National Disabled Students Union is a nationwide, cross-disability, student organization concerned with civil rights. We work to ensure that all disabled students have the opportunities they need to learn, the opportunities they need to live and work, and the opportunities they need to be full participants in their communities and full members of American society.

Senators Orrin Hatch and Patrick Leahy,
Chairman and Ranking Member, Judiciary Committee
1/23/03

Dear Senators Hatch and Leahy:

The National Disabled Students Union – a cross-disability organization representing disabled students at all levels of education across the United States – urges you to reject the Bush Administration's nomination of Jeffrey Sutton, Esq. to the 6th U.S. Circuit Court of Appeals, since it would be inconsistent with the legacy of George H.W. Bush and extremely injurious to rights of over 54 million Americans with disabilities protected by the Americans with Disabilities Act.

According to *CNN* reporter Kelli Arena, President Bush recently stated in the wake of divisive remarks by Trent Lott that the, "... Republican Party cares deeply about each individual... and I will continue to promote policies that enable the American individual to achieve his or her dreams." The nomination of states' rights legal activist Jeffrey Sutton, who admitted in a 1998 *Legal Times* interview with Tony Mauro that he was on the "lookout" for and actively sought out cases to advance the states' rights agenda at the expense of the rights of discriminated-against individuals is clearly inconsistent with that commitment, since Sutton's legal victories have already severely eroded the rights of 54 million persons with disabilities as well as many other individuals to obtain redress for legitimate grievances they have against discriminatory state entities.

The following are a list of our primary objections to Sutton. For additional details about our grievances, please refer the longer version of this letter, attached below, which contains more detailed supporting evidence.

- 1) Sutton is an opponent of the ADA, who characterized Alabama's case in *University of Alabama v. Garrett* as a "challenge to the ADA across the board."
- 2) Sutton's attacks on the ADA jeopardize the civil rights of ordinary people such as Patricia Garrett and have inspired increasingly aggressive assaults on the constitutionality of the federal laws protecting persons with disabilities' right to a level playing field in education and employment.
- 3) In *University of Alabama v. Garrett*, Sutton falsely argued that states had been benevolent to persons with disabilities, that there was no record of state discrimination against the disabled and that there was no need for a national Americans with Disabilities Act.
- 4) Sutton is on the record in a 1998 interview with Tony Mauro of the *Legal Times* as stating that he takes on states rights cases challenging federal civil rights laws because he believes in states' rights.

430 North East 16th Avenue, Portland, OR 97343
803-524-6029
<http://www.disabledstudents.org>

- 5) In cases such as *Westside Mothers v. Haveman*, Sutton has sought to negate individuals' rights to hold states accountable for not providing services they are obligated to under federal law, such as Medicaid.
- 6) Sutton's expansion of states' rights at the expense of civil rights is based on a misguided 1890 decision in *Hans v. Louisiana* by most of the same justices that later decided that segregation was constitutionally permissible despite the 14th Amendment in the *Plessy v. Ferguson* case.
- 7) Since Sutton and Rehnquist's states rights jurisprudence relies on precedents from the court that endorsed segregation and encroaches so much on the civil rights of individuals from so many groups, it is inconsistent with the commitment to civil rights for all that the Republican Party has reaffirmed in the wake of the Trent Lott episode.
- 8) Sutton's view of states' rights is so extreme that Bush's own capstone, the Leave No Child Behind Act, the Help America Vote Act, as well as major components of the New Freedom Initiative would be ruled unconstitutional if his view of state-federal relations prevailed.

Therefore, the appointment of Jeffrey Sutton would constitute a severe blow to the individual rights of persons with disabilities and other discriminated against groups, and would send a message to the disability rights community and the National Disabled Students' Union that would adversely impact the Bush Administration and its allies' future relationship with these groups. To be consistent with George H. W. Bush's distinguished legacy for widening the circle of inclusion and your honorable commitments to the disabled community, we respectfully urge you to make the right decision and firmly reject the Sutton nomination. Thank you for your consideration.

Sincerely,

Sarah Triano
Grassroots Organizing (Outside Action) Committee Chair, NDSU

Daniel Davis
Government Affairs (Inside Action) Committee Chair, NDSU

Joseph Hall
Isaac Huff
Co Chairs (Responsibility Coordinators), NDSU

Cc: Troy Justesen, Katy Hayes, ADA Watch

Longer Version with Explanations and Documentation:

Dear Senators Hatch and Leahy:

The National Disabled Students Union – a cross-disability organization representing disabled students at all levels of education across the United States – urges you to reject the Bush Administration's nomination of Jeffrey Sutton, Esq. to the 6th U.S. Circuit Court of Appeals, since it would be inconsistent with the legacy of George H.W. Bush and extremely injurious to rights of over 54 million Americans with disabilities protected by the Americans with Disabilities Act.

According to CNN reporter Kelli Arena, President Bush recently stated in the wake of divisive remarks by Trent Lott that the, "... Republican Party cares deeply about each individual... and I will continue to promote policies that enable the American individual to achieve his or her dreams." The nomination of states' rights legal activist Jeffrey Sutton, who admitted in a 1998 *Legal Times* interview with Tony Mauro that he was on the "lookout" for and actively sought out cases to advance the states' rights agenda at the expense of the rights of discriminated-against individuals is clearly inconsistent with that commitment, since Sutton's legal victories have already severely eroded the rights of 54 million persons with disabilities as well as many other individuals to obtain redress for legitimate grievances they have against discriminatory state entities.

Jeffrey Sutton is vocally opposed to the Americans with Disabilities Act. He represented the University of Alabama in *University of Alabama v. Garrett*. His victory in this case severely weakened the Americans with Disabilities Act, by undermining the anti-discrimination protections of persons with disabilities working for state employers. Despite the long history of state discrimination against people with disabilities, including involuntary sterilization and institutionalization and denial of basic voting and civil rights and despite the fact that states like Alabama have disability rights laws that have been found by courts to lack any enforcement provisions, Sutton claimed that the ADA is altogether unnecessary. According to Page 11 of the *Garrett* oral argument transcript, from October of 2000, when a Supreme Court Justice asked Mr. Sutton if the *Garrett* case just applied to employment aspects of the ADA, Sutton replied, "Well, Your Honor, it's a challenge to the ADA across the board." Sutton is out to destroy a piece of legislation that George H.W. Bush cites as one of his proudest accomplishments. This is judicial activism, not judicial restraint.

Persons with disabilities have suffered grievously as a result of Sutton's triumph. People like Patricia Garrett, a nurse who admirably persevered despite having breast cancer and continued to excel in her job performance, but was nevertheless forced out of her job by a boss who did not like having "sick people" around, cannot receive damages even though she suffered a serious loss of income due to the supervisor's irrational bias. Without the prospect of damages, fewer lawyers will represent persons with disabilities who are discriminated against in the work place. And many states have become emboldened to challenge the constitutionality of Title II of the ADA, which fundamentally guarantees our right to access state programs, government, courts and universities, on the same basis that Sutton invoked. Our rights are hanging in the balance, as the US Supreme Court will hear a state challenge of Title II of the ADA, *Medical Board of California vs Hason*, in late March.

If this record of hostility to individuals' rights is not bad enough, Sutton has sought to negate individuals' rights to hold states accountable for not providing services they are obligated to under federal law, such as Medicaid. His arguments in *Westside Mothers v. Haveman* that Medicaid was a contract between the state and the federal governments were so radical that both the 6th Circuit he'd be sitting on and even the conservative Rehnquist Supreme Court emphatically rejected it. In fact, Sutton's view of states' rights is so extreme that your critical legislative accomplishments such as the Leave No Child Behind Act, the Help America Vote Act, as well as major components of the New Freedom Initiative would likely be ruled unconstitutional if his view of state-federal relations prevailed.

Sutton's campaign to expand states' rights at the expense of civil rights is based on a misguided 1890 decision in *Hans v. Louisiana* by most of the same justices that later decided that segregation was constitutionally permissible – despite the 14th Amendment – in the *Plessy v. Ferguson* case. The 11th Amendment had been designed to protect states from lawsuits by non-citizens of the state and foreign countries, in response to *Chisholm v. GA* a case in which an individual from another state sued the state of Georgia. The *Hans* court presumed to divine an original intent that the framers meant for no individual to sue their own state, when nothing could be further from the truth. That this court found segregation consistent with a post 14th Amendment constitution shows how wrongheaded they were and why their precedents should not be relied upon.

Since Sutton's states' rights jurisprudence relies on precedents from the court that endorsed segregation and encroaches so much on the civil rights of individuals from so many groups, it is inconsistent with the commitment to civil rights, impartial administration of justice and equal protection for all that the Republican Party has reaffirmed in the wake of the Trent Lott episode. To truly disassociate the GOP from opponents of civil rights requires not nominating those whose jurisprudence is inspired by opponents of civil rights. Sutton is foremost on this list of judges whose nomination should accordingly be rejected.

Therefore, the appointment of Jeffrey Sutton would constitute a severe blow to the individual rights of persons with disabilities and other discriminated against groups, and would send a message to the disability rights community and the National Disabled Students' Union that would adversely impact the Bush Administration and its allies' future relationship with these groups. To be consistent with George H. W. Bush's distinguished legacy for widening the circle of inclusion and your honorable commitments to the disabled community, we respectfully urge you to make the right decision and firmly reject the Sutton nomination. Thank you for your consideration.

Sincerely,

Sarah Triano
Grassroots Organizing (Outside Action) Committee Chair, NDSU
Daniel Davis
Government Affairs (Inside Action) Committee Chair, NDSU

Joseph Hall
Isaac Huff
Co Chairs (Responsibility Coordinators), NDSU